Supreme Court, U.S.
FILED

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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

ROGER S. SANDERSON,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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78 pp

THE QUESTIONS

Can the Government deny, by omission, commission or by an implied statute of limitations, the right of the Petitioner to bring cause against the Government Agency that committed the offense that denied Petitioner his full pension?

Can the Government cover-up the offense of the Government Agency by applying the USC, FPM, and Precedent Cases made **after** the offense was committed?

Can the Government ignore or alter the meaning of the testimony of the Government Official that committed or was caused to commit the offense?

Can the Government deny the Petitioner a full pension based on the facts of this case and by applying the USC, FPM and Precedent Cases made after the offense by the Government Agency?

TABLE OF CONTENTS

Page

The Questions i

Opinions Below 1

Jurisdiction 1

Constitutional Provisions 1

Statement of the Case 2

Reasons for Certiorari 2

I. The Skewed Playing Field 2

II. Proper Respondent 4

III. Discovery of VA Misinformation and the Unavailability of Information From OPM 5

IV. The Issue of Involuntariness 7

A. The Rules Set Down 7

B. Judge Albornoz's Personal Opionions 8

C. The Declaration of Paul Danville of the VA 9

D. The Decisions of OPM, The Judge, The Board and The Court 9

1. OPM's Concept of Valid v. Invalid Involuntary Separation 9

2. The Case of Gammill (1982) 12

3. The Case of Richmond (1990) 13

V. The Issue of the Application of Public Law 97-72 14

A. Justification of PL 97-72 and Grandfathering 14

TABLE OF CONTENTS – Continued

Page

B. The Importance of "Involuntary Separation" 15

VI. Summary of Reasons for Certiorari 16

A. Proper Respondent 16

B. Admissible Evidence 17

C. Addendum 1 17

D. Addendum 2 18

E. The True Test 18

Abbreviations 20

TABLE OF AUTHORITIES

Page

CASES

Asprin v. OPM, 53 MSPR 320 (1992) 17

Avila v. OPM, 79 F.3d 128 (Fed. Cir. 1996) 17

Covington v. Department of Health and Human Services, 750 F.2d 937 (Fed. Cir. 1984) 8

Gammill v. OPM, 29 MSPR 484 (1985) 11, 12, 13

Horner v. Benedetto, 847 F.2d 814 (Fed. Cir. 1988) 15

Manion v. MSPB, 737 F.2d 102 (Fed. Cir. 1984) 10

Oden v. OPM, 58 MSPR 249 (1993) 10

OPM v. Richmond, 496 U.S. 414, reh'g denied, 497 U.S. 1046 (1990) 13

Robinson v. U.S. Postal Service, 50 MSPR 433 (1991) 6

Sharf v. Department of the Air Force, 710 F.2d 1572 (Fed. Cir. 1983) 8

Tiffany v. Department of the Navy, 795 F.2d 67 (Fed. Cir. 1986) 10

Villanueva v. OPM, 980 F.2d 1431 (Fed. Cir. 1992) 17

STATUTES AND REGULATIONS

5 U.S.C. 8336(d)(1) 8, 10, 11

5 U.S.C. 8332(j) p. 236 17

PL 97-72 (1981) 9, 14, 15

The Omnibus Budget Act of 1982, PL 97-346 (1982) 17

OPINIONS BELOW

The orders of the lower courts are reproduced in the attached appendix, beginning at App. 1. The United States Court of Appeals for the Federal Circuit decision on October 10, 1997, The United States Merit Systems Protection Board, Nov. 15, 1996 reported as Sanderson v. OPM, 72 M.S.P.R. (1996), and Judge Albornoz of the Merit Systems Protection Board, February 27, 1996.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on October 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

This case involves the interpretation of the following constitutional provisions and statutes:

From the Fourteenth Amendment to the United States Constitution:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the **equal** protection of the laws."

From The Federal Rule of Civil Procedure 60(b)(6):

> (b) On motion and upon such terms as are just, the court may relieve a party or party's legal representatives from a final judgment, order, or

> proceeding for the following reasons. . . . (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

The Government has failed to honor a pension negotiated in good faith with a government employee *who was asked to resign* in 1981. The offense of the Government Agency was not *discovered* until 1992. After discovery, OPM ruled that legislation, regulations and precedent cases made *after* 1981 made the Agreement between the Agency and the employee immaterial. The Courts upheld OPM's rulings. The Pension Agreement stated that the employee was to receive his full pension based on his high three years salary. The Government rulings delayed his pension 11 years and reduced his pension more than two/thirds. There were no Government Laws in 1981 that would have negated a full pension based on the facts of the separation. It was the will of the Congress at that time that an employee who is separated from the service involuntarily, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service, or after becoming 50 years of age and completing 20 years of service, is entitled to an immediate annuity.

REASONS FOR CERTIORARI

I. THE SKEWED PLAYING FIELD

In a Nation dedicated to Justice, it is only just to examine the playing field on which Justice is being

served. The Government requires that the employee must bear the burden of proof in any dispute. The employee must prove his case, not to an impartial jury, but to Government appointed Judges, who by their own words are prejudiced to support the Government's position. Judge Albornoz stated: "Moreover, I find that as the agency entrusted with the administration of retirement laws and the promulgation of the implementing regulations, OPM is entitled to great deference in the interpretation of the retirement statutes. (A32).

On such a playing field it becomes of paramount importance that the employee be granted a speedy and fair decision. In this case the final decision came sixteen years after the separation and six years after discovery by Dr. Sanderson that he had been "bated and switched" by the various Federal Government Agencies that were involved in his pursuit of his pension . The fairness issue in this case must be questioned not only on the length of the proceedings, but also on decisions made in the proceedings that could have (and should have) been interpreted in Dr. Sanderson's favor rather than his detriment. Dr. Sanderson had great difficulty locating a lawyer to represent him. The fact is there is no reference source available for obtaining legal counsel knowledgeable in this court system, which further relegates the government employee to operate on an unlevel and very expensive (i.e. very unfair) playing field as evidenced by OPM's extensive Table of Authorities, Statutes and Regulations used in this case. (A44). Thirty-nine of the 55 cases cited, were tried after Dr. Sanderson's separation from service in 1981.

II. PROPER RESPONDENT

The first such indication of an unfair playing field came when Judge Albornoz stated in her decision that Dr. Sanderson should have filed an appeal against the VA Hospital, not the OPM (A24, 27, 28). No mention was made in her decision as to how a government employee could accomplish such a filing. She only states that such a suit may be untimely.

Judge Albornoz stated in her decision that Dr. Sanderson's Lawyer was advised of the proper defendant being the VA (A24). No such advice was given, as affirmed by an affidavit signed by Dr. Sanderson's lawyer (A37). The Board in its Appeal Decision stated: "Even assuming that the appellant can establish that the administrative judge erred by making that statement, the appellant has not shown how any such error prejudiced his substantive rights with respect to the instant appeal". (A11). OPM brought up the issue again in the final appeal to the Court of Appeals: "To the extent that Dr. Sanderson may have a proper remedy at this time for his allegedly *invalid* involuntary separation, his cause of action would lie against the VA, not OPM. (A52).

After six years from discovery, Judge Albornoz failed to notify petitioner of his rights to bring an action against the VA. After six years, the Board stated that the Judge's failure did not prejudice the case. After six years, OPM's statement to the Court added up to the fact that the six years Petitioner spent jumping through the hoops of OPM and the MSPB were all for naught because his cause

of action was against the wrong Government Agency! (A52).

And what is the definition that would make such a cause of action against the VA untimely? one day?; one year?; 10 years?. . . . and from the date of the offense by the agency or from the date of discovery of the offense? Neither in this case or in any known precedent case has this been delineated. The only conclusion is that Dr. Sanderson was deprived of what the Government ruled was his *only* chance of receiving an invalid discontinued annuity.

Judge Albornoz erred in not making the VA the respondent, co-respondent or at the very least informing Dr. Sanderson's counsel of how to proceed with a VA appeal. The Board erred in denying the case had been compromised.

Dr. Sanderson believes that if he had been allowed to file his appeal against the VA or against the VA and OPM, he would have prevailed in the pursuit of his full pension for the reasons set forth in this document.

III. DISCOVERY OF VA MISINFORMATION AND THE UNAVAILABILITY OF INFORMATION FROM OPM

The involuntariness of Dr. Sanderson's separation was not evident to OPM until 1992 after Dr. Sanderson first demanded to see his records, and was not proven until 1996 by the Declaration of Paul Danville (A40). When the facts began to unravel in 1992, it became obvious that the wording of documents made by Paul

Danville in 1981 left the OPM to believe that Dr. Sanderson voluntarily resigned. Paul Danville stated that Dr. Sanderson called the Hospital and asked to resign (A38). This was not the truth and was a grievous error on the part of the Hospital. Had the Hospital presented these documents to Dr. Sanderson for his approval and signature, the corrections could have been made, and the terms of the retirement clarified for the OPM. Instead the Hospital, for reasons unknown, chose to rely on a telephone call made **to** Dr. Sanderson **by** Paul Danville.

The Board cites Robinson v. U.S. Postal Service, 50 MSPR 433, 438-39 (**1991**) to justify an oral resignation. Robinson verbally on the job said, "I Quit!", and walked off. Aside from the ruling in Robinson being made 10 years after the involuntary separation of Dr. Sanderson, Robinson had no similarity to, nor in any way can justify the events that occurred in Sanderson.

Herein lies the deception, but later, in 1996 in preparation for the case before Judge Albornoz, Paul Danville gave his Declaration under penalty of Perjury that clearly corrects and clarifies that he called Dr. Sanderson to ask for his resignation for the good of the Hospital and told him that the retirement would not adversely affect his pension (A40). In a supplemental declaration before the Court, Danville clarified the pension to be based on his high three years salary (A43). Dr. Sanderson, always interested in promulgating the relationship between the VA and the University, and furthering the careers of full-time University Professors, agreed to resign but only if he received a full pension based on his high three years salary.

It was not until Dr. Sanderson, following OPM instructions, applied for his pension in 1992 that the full facts of the case began to slowly unravel. Had the *full* facts, as were then known by OPM in 1982, been revealed to Dr. Sanderson when he inquired about his pension through his Senator, this unraveling could have began 10 years earlier. This unavailability of information points out a gap in government function, not a gap in the due diligence of Dr. Sanderson.

After all of the facts were uncovered, Dr. Sanderson, a UCLA and later UCI Clinical Professor of Surgery, and a Chief Grade 9 Surgeon at the Long Beach Veteran's Hospital, had been solicited to retire, had his paperwork processed with false information, was deprived of seeing his records, and on requesting information from OPM was provided with inadequate information to know what had transpired. Judge Albornoz's personal opinions on the matter have no basis in fact in events or in law (A26, 27).

IV. THE ISSUE OF INVOLUNTARINESS

A. The Rules Set Down

The second indication of an unfair playing field is the Government rulings on involuntary termination. The rules set down in the U.S.C., the FPM and defined in Precedent Cases clearly state the circumstances under which an employee can be granted a discontinued annuity. These circumstances were substantiated and clearly presented by both sides in the case ending with completely opposite conclusions. Dr. Sanderson was 51 years of age with over 25 years of government service on

September 29, 1981 when he was separated from service. When it became obvious that the separation was involuntary, Dr. Sanderson should have been given his full pension under Title 5 U.S.C. & 8336(d)(1). which states that an employee who is separated from the service involuntarily, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service, or after becoming 50 years of age and completing 20 years of service, is entitled to an immediate annuity.

Two cases tried after 1981 give broad definitions of involuntary retirement. In **1983**, the case of Sharf v. The Department of the Air Force, 710 F.2d 1572 (Fed. Cir. 1983) at p. 20 states: "Unless the employee presents sufficient evidence to establish that the retirement was obtained through duress or coercion, or shows a reasonable person would have been misled by the agency statements, the termination will be deemed to be voluntary."

In 1984, in the case of Covington v. Department of Health and Human Services (750 F.2d 937), the Court held that: **"A resignation is involuntary if it is obtained by an agency through misinformation whether that information is negligently or innocently provided and if the employee relies on the information. Then therefore, the resignation has to be deemed involuntary."**

B. Judge Albornoz's Personal Opinions

Judge Albornoz in her ruling took the liberty to judge Dr. Sanderson's intelligence and to change the meaning of Danville's Declaration by stating: ". . . . I find that a reasonable person in the appellant's circumstance, would not have been misled by Danville's statement. I find the

appellant, a 50-year physician, with 20 years of Federal service, knew or should have known, that he was not eligible for immediate retirement at the highest annuity rate. . . . I find that Danville's statement to the appellant that he would receive a full pension as a valued 25-year employee **means** the full pension to which the appellant was entitled at the time, i.e., a deferred annuity at age 62" (A27).

C. The Declaration of Paul Danville of the VA.

In the Appeal to the Court, Danville clarified Judge Albornoz's personal opinion in a Supplemental Declaration by stating: **"I specifically, and on behalf of the VA Hospital, advised Dr. Sanderson that it was the intention of the VA Hospital that Dr. Sanderson receive his full pension and that his separation not affect his pension. By this I meant his pension based upon his High Three Years Salary. I did not explain to him Public Law 97-72 as we did not believe this law applied to Dr. Sanderson who was separated prior to the effective date of this Law." (A43).**

D. The Decisions of OPM, The Judge, The Board and The Court

1. OPM's Concept of Valid v. Invalid Involuntary Separation

Instead of granting the pension, Judge Albornoz, and later The Board cited the FPM which was in effect in 1981 and concluded that none of the requirements of the FPM

Supp. 831-1, subch. 511-29(a) (Sept. 21, 1981) were present in Dr. Sanderson's retirement (A9, 10, 28, 29).

Both the U.S.C. and the FPM define involuntary separation as any separation against the will and without the consent of the employee, other than separation for cause on charges of misconduct or delinquency. One of the provisions of the FPM states: " . . . whether a separation is involuntary depends upon all the facts in a particular case; it is the true substance of the action which governs rather than the methods followed or the terminology used" (A9).

In its Brief to the Court, OPM for the first time came up with the novel definition of two types of involuntary separation: **valid** and **invalid**. An involuntary separation is valid if it falls within the examples given in the FPM. The involuntary separation is invalid if it is an adverse action obtained by misinformation and without proper procedure. Valid separation requires only a determination of whether the separation from service was involuntary for retirement purposes, as contemplated by 5 U.S.C. § 8336(d)(1). Invalid separation requires a determination of whether the separation from service was obtained by coercion, deception or misinformation for Board Jurisdictional purposes. ***OPM states that this type of determination could only be made by a cause of action against the VA.***, citing Tiffany v. Department of the Navy, 795 F.2d 67, 69 (Fed. Cir. **1986**), Manion v. MSPB, 737 F.2d 102 (Fed. Cir. **1984)** and Oden v. OPM, 58 MSPR 249 (**1993**). (OPM Brief pp. 17-19). OPM did not state when its definitions of valid and invalid came into use, but it is apparent they were not in place in 1981 when Sanderson separated, nor

in 1985 when the case of *Gammill v. OPM*, 29 MSPR 484 (1985), was decided.

Gammill was cited as an example of an invalid involuntary separation. OPM stated: "Assuming that Dr. Sanderson's decision to resign constituted an 'involuntary' separation in the sense that it was obtained by misinformation, Dr. Sanderson would still not be entitled to a discontinued service retirement because the term 'involuntary' as used in 5 U.S.C. § 8336(d)(1), refers only to a valid separation on involuntary grounds, as in the case when there is a reduction in force, abolishment of position, lack of funds, liquidation of an office or an entire agency, geographical transfer, or an expiration of a time-limited appointment. (A48).

The Court ruled that Dr. Sanderson's retirement was not involuntary: "Sanderson did not allege or meet any of the circumstances (i.e. the examples) set forth in the Federal Personnel Manual that constitute involuntary separation entitling an individual to a discontinued service annuity" (A2, 9, 10, 28).

In light of the Government's failure to name the VA as a Respondent or Co-Respondent or to inform Sanderson of the necessity of a VA appeal, **this single ruling by the Government is capricious and should not be allowed to stand.** The examples in the FPM were not meant to be a cage from which government employees cannot escape. At the conclusion of the examples in the FPM it states: **"Note, however, that whether a separation is involuntary depends upon all the facts in a particular case; it is the true substance of the action which governs**

rather than the methods followed or the terminology used".

The Court ruled that "Dr. Sanderson's arguments regarding the involuntariness of his resignation to agency misinformation are **immaterial** to the question of the type of annuity he is entitled to receive". . . . "the determination of an involuntary separation for retirement purposes under 5 U.S.C. chapter 83 is totally separate and distinct from a determination of involuntary retirement . . . for Board jurisdictional purposes" (A2).

2. The Case of Gammill (1982)

The Board further stated that whether or not the resignation was voluntary is immaterial because involuntariness based on misrepresentation is insufficient to establish entitlement to a discontinued service retirement annuity. In this regard, the Board cited Gammill, a case amazingly similar to Sanderson. Both were misinformation cases but Gammill in addition was a discrimination based on a handicap case. The Government Agencies involved in both of these cases negotiated the pension terms after which OPM refuted the pensions stating recently enacted legislation forbid the terms. In Gammill, *The Board ruled that his resignation was coerced and therefore involuntary.* To do *this the Board did not use the valid v. invalid explanation given by OPM, but used the same quote in the FPM used by Petitioner in his argument above: "It is the true substance of an action which determines whether a separation is voluntary or not for discontinued service retirement purposes".* The Board goes on to say: "but that alone would not make him eligible for a discontinued annuity".

They did however, void the settlement agreement between Gammill and the Agency which left him on the roles in a position in which he was eligible for a discontinued annuity prior to the date of the passage of the new legislation. *Gammill* was granted his discontinued annuity. (*Gammill v. OPM*, 29MSPR 484 (1985)).

The Government had these same options in Dr. Sanderson's case but refused to use them. It would seem that a caldron of options are available to the Judges who in Judge Albornoz's own admission have a duty to give great deference to OPM's interpretation of the retirement statutes.

3. The Case of Richmond (1990)

The Court determined that the issue presented was whether "erroneous oral and written advice given by a Government employee to a benefits claimant may give rise to estoppel against the Government and so entitle the claimant to a monetary payment not otherwise permitted by law". (*OPM v. Richmond*, 496 U.S. 414, reh'g denied, 497 U.S. 1046 (1990)). The Supreme Court held that "payments of money from the federal treasury are limited to those authorized by statute". In 1981 at the time Sanderson should have been involuntarily retired, there were no Federal Laws that would not have authorized his full pension.

V. THE ISSUE OF THE APPLICATION OF PUBLIC LAW 97-72 (passed Sept. 1981 for employees retiring after December 31, 1981)

The third indication of an unfair field concerns the issue of the application of Public Law 97-72 to Dr. Sanderson. This Law changed the calculation of pensions of part-time employees in the VA from being based on the average of the high three years salary to a pro-rata rate based on the years of part-time service: a much smaller pension.

A. Justification of PL 97-72 and Grandfathering

There is no question that in 1981 the time had come for the Government to change the pension rules of part-time employees in the VA. In the fifties, sixties and seventies the Government welcomed part-time physicians and medical personnel to help provide care for veterans and help educate the future generation of physicians. By the eighties, the Nation had a surplus of physicians, and Veteran's Hospitals were strongly affiliated with the nearest University Medical Schools. The part-time positions available were filled with full-time University doctors who had their pension plans with their University and were not solely reliant on the Government pension system. The new rules were made for the eighties, *after* Dr. Sanderson left the service of the Department of Veterans Affairs. It is highly unfair that at the end of a career new rules be applied retroactively to affect an entire career. To deny a physician the pension that was held out when the Government was in need of his services, is to negate the important role that part-time Government employees

played in the care of the Nation's Veterans in both war and peace. Surely it was not the intent of Congress to effect such a result.

B. The Importance of "Involuntary Separation"

The Court stated in its decision in Sanderson: "A deferred annuitant "retires when he first becomes entitled to receive his annuity", citing *Horner v. Benedetto,* 847 F.2d 814 **(1988).** Unless it were granted that Dr. Sanderson's separation was involuntary, he would not have been eligible for a discontinued retirement in 1981. Involuntary separation is paramount to this case. The Government first said that it is immaterial if Dr. Sanderson's separation was voluntary or involuntary because involuntariness based on misrepresentation is inefficient to establish entitlement to a discontinued annuity, (even though they entitled Gammill), then they say that because Dr. Sanderson's separation is not involuntary he is subject to Public Law 97-72. Adversely, if Dr. Sanderson's separation is involuntary, (which [illegible] has more than amply proven), there is absolutely no [illegible]n, by statute or precedent cases that the Government could not have interpreted Public Law 97-72 to mean just what is written into the law; that the intent of Congress was to have its rules applied to those **retiring after January 1, 1981.** Alternately the Government could have made the Law nonapplicable to Sanderson by the methods used in Gammill.

VI. SUMMARY OF REASONS FOR CERTIORARI

A. Proper Respondent

Dr. Sanderson did not have a fair trial without the VA as a respondent. The involuntary resignation issue is the entire key to Dr. Sanderson's contention that he is entitled to a discontinued annuity. To this point the Government has consistently swept the Declaration of Paul Danville under the rug and essentially said: no matter: it doesn't matter: "Board jurisdictional purposes" make it immaterial. (A2).

OPM stated in its brief to the Court that only a cause of action against the VA could determine whether or not the separation in this case was involuntary. (A52). Although the Board ruled in Gammill that his separation was coerced and therefore involuntary, it refused to make such a ruling in Sanderson. The Government failed to address the truthfulness of Danville's statements. If they did accept his statements as true, they had an obligation to correct the wrong that was done. If they disbelieved his statements on evidential grounds, they were obliged to proceed with Perjury charges, that would bring to light every detail of Dr. Sanderson's separation from service. Instead they stonewalled the essence of Dr. Sanderson's case using the U.S.C., FPM and Precedent Cases tried after 1981. The Government cannot with one hand say that only a cause of action against the VA can determine if the separation was voluntary or involuntary, and with the other hand block those procedures necessary to bring such an action.

The issue of the misinformation given by the Hospital to the OPM, the manner in which the paper work was

submitted, the manner in which this information was kept from Dr. Sanderson for so many years and the manner in which the OPM handled the case after the truth was known demands accountability.

B. Admissible Evidence

The Government, on discovering an Agency had committed an offense as proven by the Declaration of Paul Danville, should have judged Dr. Sanderson's pension based upon the Laws, Regulations and Precedents in effect on the date of the offense (i.e. the date of his "separation"), not on the date of his "retirement" eleven years later that was directly a result of the offense. In the Board's own words: **"The Laws that are applicable to the appellant's annuity rights are the Laws that were in effect at the time of his separation on Nov. 29, 1981".** (citing *Asprin v. OPM*, 53 MSPR 320, 323-25 **1992;** *Avila v. OPM*, 79 F.3d 128, 130 Fed Cir.; **(1996)**; *Villanueva v. OPM*, 980 F.2d at 1432-33.) (A16). Conversely, laws that were not in effect at the time of his separation should not be applied to deny the appellant's annuity rights.

C. Addendum 1

Just as one would expect the Pension Laws of the Nation to respect the Grandfather issue, one would also expect the Government to make certain its Laws respect and give credit for mandatory military service time. 5 U.S.C. § 8332(j) and PL 97-346, The Omnibus Budget Act of **1982**, denies Sanderson's Military Service Time and unfairly, retroactively and selectively denies an entire

group of people credit for their mandatory military service. It must be asked anew if this was the intent of Congress.

D. Addendum 2

The Supreme Court has already expressed itself in Richmond saying that payments of money from the Federal Treasury are limited to those authorized by statute, and erroneous advice given by a Government employee to a benefits claimant cannot estop the Government from denying benefits otherwise permitted by law. . . . Where Congress wishes to recognize claims for estoppel, it knows how to do so, as it has done by statute in the past.

It is germane to this case that in 1981 the claimant was entitled to a monetary payment permitted by the Law as it then existed.

What is the recourse for government employees given misinformation and either unintentionally, or intentionally tricked into resignation to their detriment? If the rulings in this case are allowed to stand, there will be no recourse in the Judiciary: it will take an Act of Congress.

E. The True Test

Does this case represent decisions that are arbitrary, capricious, an abuse of discretion, or unlawful; procedurally deficient; or unsupported by substantial evidence? Dr. Sanderson believes this case represents exactly all of that.

By reviewing this case and restoring Dr. Sanderson's full pension, the Supreme Court could calm the troubled

waters of the Government's pension system, give direction to the Ship of State, and insure that the events of this case cannot happen again.

Respectfully submitted,

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Pro Se

Abbreviations:

OPM	The Office of Personnel Management.
Judge	Administrative Judge Albornoz of the Merit Systems Protection Board.
Board	The United States Merit Systems Protection Board
Court	The United States Court of Appeals for the Federal Circuit
VA	The Department of Veteran's Affairs and the VA Veteran's Hospital Long Beach California
The Government	All of the above collectively
USC	United States Code
FPM	Federal Personnel Manual
Decl	Declaration of Paul Danville
Sup. Decl	Supplemental Declaration of Paul Danville
Aff	Affidavit by Lawyer
App	Appendix

Index to the Appendix

Decision of U.S. Court of Appeals for the Federal Circuit A1

Decision of MSPB A5

Decision of Judge Albornoz A20

Declaration of Stephen M. Tornay A37

Report of Contact dated 10-8-81 (VA Form 119) A38

Declaration of Paul Danville A39

Supplemental Declaration of Paul Danville A43

OPM Table of Authorities, Statutes and Regulations A44

OPM Brief for Respondent pgs. 9, 16, 17, 18, 19. ..... A48

NOTE: Pursuant to Fed. Cir. R. 47.6, this dispositon is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

97-3106

ROGER S. SANDERSON,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

DECIDED: October 10, 1997

Before NEWMAN, PLAGER and CLEVENGER, *Circuit Judges*.

PER CURIAM.

DECISION

Roger S. Sanderson petitions for review of the November 15, 1997 final decision of the Merit Systems Protection Board ("Board"), Docket No. SF-0831-95-0692-I-2. The Board found that Sanderson was not eligible for a Civil Service Retirement System discontinued service annuity, that OPM correctly computed his deferred annuity, and that he cannot make an untimely deposit into the civil service retirement fund to cover his post-1956 active military service period. We *affirm*.

DISCUSSION

We have jurisdiction to hear this appeal under 28 U.S.C. § 1295(a)(9) (1994). When reviewing a decision by the Board, we may reverse only if the decision was arbitrary, capricious, an abuse of discretion, or unlawful; procedurally deficient; or unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1994). *Cheeseman v. Office of Personnel Management*, 791 F.2d 138, 140 (Fed.Cir. 1986).

On appeal, Sanderson argues that he was *involuntarily terminated* from his position at the VA, and therefore, is entitled to a discontinued service annuity rather than a deferred annuity. As the Board noted, "[t]he determination of an involuntary separation *for retirement purposes* under 5 U.S.C. chapter 83 is 'totally, separate and distinct from' a determination of involuntary retirement . . . *for Board jurisdictional purposes.*" Thus, *Sanderson's arguments regarding the involuntariness of his resignation due to agency misinformation are immaterial to the question of the type of annuity he is entitled to receive.* The Board did not err in determining that Sanderson did not allege or meet any of the circumstances set forth in the Federal Personnel Manual that constitute involuntary separation entitling an individual to a discontinued service annuity. *See Federal Personnel Manual Supp.* 831-1, subch. 511-2(a) (Sept. 21, 1981) (defining "involuntary separation" at the time of Sanderson's resignation).

Sanderson also contends that his annuity should not be pro-rated for his part-time service. This argument shows a misunderstanding of the term "retires" for purposes of 38 U.S.C. § 7326. *A deferred annuitant "retires" when he first becomes entitled to receive his annuity. See*

Horner v. Benedetto, 847 F.2d 814, 818 (Fed.Cir. 1988). Though Sanderson separated from part-time service on November 29, 1981, he did not become eligible to receive his deferred annuity until January 19, 1992, when he turned 62 years old. Thus, Sanderson retired on January 19, 1992 and is subject to 38 U.S.C. § 7426 (1994) (requiring pro-rata reduction of annuity for individuals who served at any time on a less-than-full-time basis and who retired after December 31, 1981).

Sanderson also challenges the denial of credit for his VA service as a medical student. In its decision, the Board observed that Sanderson bore the burden of proof, but failed to provide any evidence to prove he was entitled to credit aside from a medical school transcript noting the VA hospital without dates or hours worked. We agree with the Board that the transcript is not entitled to consideration on review because the document was submitted after the initial AJ decision, and no showing was made that the transcript was previously unavailable, new, and material evidence. *See* 5 C.F.R. § 1201.115(d)(1) (1997).

Finally, Sanderson maintains that he has the statutory right to make a deposit to obtain credit for his post-1956 military service. Sanderson's separation from service occurred on November 29, 1981. The statute allows credit for post-1956 service provided a deposit is timely paid; however, this does not apply to Sanderson since he was entitled to an annuity based on a separation from service occurring before the enactment date of September 8, 1982. *See* Pub. L. No. 97-253, § 307, as amended Pub.L. No. 97-346, § 3(k), 96 Stat. 1649 (1982) (codified as 5 U.S.C. § 8334(j)(1)(A)). As a result, the Board did not err in

concluding that Sanderson was not entitled to make a deposit, and that his annuity is subject to the appropriate reduction.

Accordingly, the Board's decision is affirmed.

United States Court of Appeals
for the Federal Circuit

97-3106

ROGER S. SANDERSON,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

in CASE NO(S). SF0831950692-1-2

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER
OF THE COURT

DATED OCT 10 1997 /s/ Jan Horbaly lk
Jan Horbaly, Clerk

ISSUED AS MANDATE: December 1, 1997

Docket Number : SF-0831-95-0692-I-2
Participant Type : Private Attorney

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROGER S. SANDERSON, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency. (CSA 3 337 333)	DOCKET NUMBER SF-0831-95-0692-I-2 DATE: NOV 15 1996

Michael P. Calof, Esquire, Woodland Hills, California, for the appellant.

Kenneth R. Brown, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

OPINION AND ORDER

This case is before the Board upon timely petitions by both the appellant and the Office of Personnel Management (OPM), seeking review of the February 27, 1996 initial decision that affirmed OPM's reconsideration decision in part and reversed it in part. For the reasons discussed below, we DENY the appellant's petition for review and GRANT OPM's petition for review under 5 C.F.R. § 1201.115. We AFFIRM as MODIFIED by this Opinion and Order the initial decision's finding that the appellant is entitled only to a deferred annuity, but we REVERSE the initial decision's finding that the appellant is entitled to make a belated deposit into the civil service retirement fund to cover the period of his post-1956 active military service.

BACKGROUND

The appellant was formerly employed at various times in either a full-time or part-time capacity as a Medical Student or Surgeon with the Veterans Administration Long Beach Veterans Hospital, Department of Medicine and Surgery (VA or Hospital), and separated on November 29, 1981, at age 51. He subsequently applied to OPM for a retirement annuity, and, on July 8, 1995, timely appealed OPM's June 9, 1995 reconsideration decision, challenging OPM's determination that he was entitled only to a deferred annuity at age 62 and OPM's computation of that annuity. Appeal File (AF) 1, Tab 1. In its reconsideration decision, OPM found that the appellant's periods of service aggregated 24 years, 7 months, and 13 days, which included the following periods: July 1, 1954,

to June 28, 1955; July 1, 1959, to June 30, 1963; and September 3, 1963, to November 29, 1981. OPM excluded the appellant's claimed service with the VA from January 1, 1953, to June 30, 1953 (1953 service), finding that the appellant failed to document it, and excluded the appellant's active military service from August 15, 1955, to August 14, 1957, finding that the appellant did not make the statutorily required deposit into the civil service retirement fund for his military service. In its computation of the appellant's deferred retirement annuity, OPM pro-rated the appellant's part-time service with the VA. AF 1, Tab 6, Subtab 2.

On appeal, the appellant contended that he was entitled to a discontinued service retirement annuity because the VA involuntarily separated him in order to accommodate a surgeon position and provided him with misinformation regarding his retirement benefits. He also contended that OPM should have given him full-service credit for his part-time service with the VA and should not have eliminated his military service and his claimed 1953 service in calculating his retirement annuity. AF 1, Tab 1, Appeal Form and Attached Statement. The administrative judge dismissed the appeal without prejudice to allow the appellant to complete discovery, and the appellant timely refiled his appeal. AF 1, Tab 10; AF 2, Tab 1.

After a telephonic hearing, the administrative judge issued an initial decision affirming OPM's reconsideration decision in part and reversing it in part. She found that OPM correctly determined that the appellant was entitled to only a deferred annuity and correctly credited his VA service periods and correctly pro-rated his part-time VA service. She found, however, that the appellant

was entitled to make a belated deposit for his post-1956 military service because he was never afforded an opportunity to make such deposit and never signed a written waiver of deposit. Initial Decision (ID) at 2-12.

In his petition for review, the appellant challenges the administrative judge's findings that the appellant failed to establish that the VA involuntarily separated him on November 29, 1981, thereby entitling him to a discontinued service retirement annuity, that the appellant failed to show that he was entitled to an annuity based on full-service credit after March 1, 1965, and that the appellant bears the burden of proving his claimed 1953 service. Petition for Review (PFR) File, Tab 1.

In its petition for review, OPM contends that the administrative judge erred by finding that the appellant was entitled to make a belated deposit for his post-1956 military service. by stating that the appellant may file a petition for enforcement on any dispute concerning the amount of back annuity due him as a result of his deposit for that service, and by implying that the appellant's claimed 1953 service was not creditable because it was temporary service and was not covered by the Civil Service Retirement System. *Id.*, Tab 3. The appellant has timely responded in opposition to OPM's petition for review and has submitted additional evidence. *Id.*, Tab 5.[1]

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[1] The appellant contends that OPM's petition for review was untimely filed. PFR File, Tab 5 at 1-2. The record shows, however, that OPM's petition for review was filed by facsimile on April 2, 1996, within 35 days of the date of issuance of the February 27, 1996 initial decision. *See* PFR File, Tab 3. Therefore, it was timely filed. *See* 5 C.F.R. § 1201.114(d).

ANALYSIS

The Appellant's Petition for Review

The administrative judge correctly found that the appellant failed to establish that the VA involuntarily separated him on November 29, 1981, and that, therefore, he did not show that he was entitled to a discontinued service retirement annuity.

The determination of an involuntary separation for retirement purposes under 5 U.S.C. chapter 83 is "totally, separate and distinct from" a determination of involuntary retirement or resignation for Board jurisdictional purposes. *Lematta v. Department of Health and Human Services*, 22 M.S.P.R. 18, 20 & n.2 (1984); *see also Anderson v. Office of Personnel Management*, 11 M.S.P.R. 60, 63-64 (1982). In determining whether a separation was involuntary for purposes of a discontinued service annuity, the Board has previously noted FPM Supp. 831-1, subch. 511-2(a) (Sept. 21, 1981), which was in effect at the time of the appellant's separation on November 29, 1981, and which provided in pertinent part as follows:

> a. Definition of term. The term *involuntary separation* means any separation against the will and without the consent of the employee, other than separation for cause on charges of misconduct or delinquency. Examples are: reduction in force; abolishment of position; lack of funds; expiration of incumbent's term of office; liquidation of an office or of an entire agency; inefficiency (unless due to the employee's misconduct); transfer of function outside the commuting area; disability (provided the separation action is initiated by the agency); separation during probation because of failure to

> qualify; or separation of an indefinite or temporary employee under OPM's instructions for displacement. . . . *Note, however, that whether a separation is involuntary depends upon all the facts in a particular case; it is the true substance of the action which governs rather than the methods followed or the terminology used.* . . .

Gammill v. Office of Personnel Management, 29 M.S.P.R. 484, 487-88 (1985) (emphasis added).

Here, the appellant did not allege any of the above circumstances set forth above in the FPM. Rather, in support of his argument that he was involuntarily separated, the appellant presented a statement, made under penalty of perjury, from Paul Danville, the Administrative Assistant in the Surgery Department at the VA Long Beach Hospital at the time of the appellant's separation on November 29, 1981. In the statement, Danville asserted that the Hospital wished to return the appellant's position from the "ENT Department" to which the appellant was assigned to the General Surgery Department where the appellant's slot could be better used and that he asked the appellant to "voluntarily terminate his position for the good of the Hospital." AF 2, Tab 6, Declaration of Paul Danville at 1-2; *see also* AF 2, Tab 5, Appellant's Statement of Facts and Issues at 1-5. Danville acknowledged that the appellant resigned upon Danville's specific assurance that the resignation would not adversely affect the appellant's retirement rights and that the Hospital intended that the appellant receive his full pension. Declaration of Paul Danville at 2. Danville further stated that he would not have asked the appellant to

resign from his position if he had known that the appellant's pension would be adversely affected. *Id.*

There is nothing in the record to indicate that any of the agency actions set forth above under the FPM occurred here. Rather, the appellant bases his allegation that his resignation was involuntary on misinformation and points to the VA Request for Personnel Action form that indicates that he resigned, contending that he never completed, signed, or commented on the form. PFR File, Tab 1, Appellant's PFR at 4; AF 2, Tab 5, Exhibit 5. We note that an employee can make a valid oral resignation where the employee's words and actions express a clear intent to resign and that a written resignation is unnecessary under such circumstances. *See Robinson v. U.S. Postal Service,* 50 M.S.P.R. 433, 438-39 (1991). The appellant, however, has not appealed his resignation as involuntary based on misinformation from the VA even though the record indicates that he was aware as early as 1983 that he would be entitled only to a deferred retirement annuity.[2] *See* AF 1, Tab 6, Subtab 6 at 4-7; ID at 3-4. In any

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[2] The appellant's counsel has submitted a declaration stating that he does not recall that the administrative judge advised him, as stated in the initial decision, that, if the appellant so desired, he could file an appeal against the VA on the basis that his November 29, 1981 resignation was involuntary but that such an appeal might be untimely. ID at 4 n.4; PFR File, Tab 1. Even assuming that the appellant can establish that the administrative judge erred by making that statement, the appellant has not shown how any such error prejudiced his substantive rights with respect to the instant appeal. Therefore, he has not shown that the initial decision should be reversed based on this alleged adjudicatory error. *Panter v. Department of the Air Force,* 22 M.S.P.R. 281, 282 (1984).

event, we find that, even assuming that the appellant's resignation was involuntary based on Danville's misinformation, a finding of involuntariness based on misrepresentation is insufficient to establish entitlement to a discontinued service retirement annuity under 5 U.S.C. § 8336(d). *Gammill*, 29 M.S.P.R. at 488-89; *Lematta*, 22 M.S.P.R. at 20 n.2; *see also Office of Personnel Management v. Richmond*, 496 U.S. 414, 416, 434 (1990) (the government cannot be estopped from denying benefits not otherwise permitted by law even if the claimant was denied monetary benefits because of his reliance on the mistaken advice of a government official). Therefore, the appellant is not entitled to a discontinued service retirement annuity. Rather, he is entitled only to a deferred annuity, as the administrative judge correctly concluded. *See* 5 U.S.C. § 8338(a).

With respect to the computation of the appellant's deferred annuity, the appellant is not entitled to full-service credit for his part-time service performed after March 1, 1965. As the administrative judge correctly found, as a former VA employee, the appellant was covered by 38 U.S.C. § 7426, which provides, inter alia, for the proration of less than full-time service in computing the annuity of an individual who retired "after December 31, 1981, and who served at any time on a less-than-full-time basis" in the VA. *Id.*; ID at 9-10. We note that, in addition to retiring after December 31, 1981, the appellant separated on November 29, 1981, after the October 1, 1981 effective date of the pertinent change in the computation of part-time service in the VA. *See* Veterans' Health Care, Training, and Small Business Loan Act of 1981, Pub. L. No. 97-72, § 402(b), 1981 U.S.C.C.A.N. (95 Stat.) 1062.

Therefore, the appellant has presented no basis for disturbing the administrative judge's finding on this issue, and we need not further address it.

Further, it is well settled that an appellant bears the burden of proving by preponderant evidence his entitlement to a civil service retirement annuity. *See, e.g., Villanueva v. Office of Personnel Management*, 980 F.2d 1431, 1433 (Fed. Cir. 1992); *Paderes v. Office of Personnel Management*, 63 M.S.P.R. 642, 644 (1994), *aff'd*, 61 F.3d 919 (Fed. Cir. 1995) (Table), *cert. denied*, 116 S. Ct. 729 (1996); *Hawco v. Office of Personnel Management*, 52 M.S.P.R. 290, 292-93 (1992). In order to meet this burden of proof, the appellant is entitled to the information upon which OPM relied in making its annuity determination. *Kozer v. Office of Personnel Management*, 52 M.S.P.R. 93, 95 (1991).

The appellant asserts on review that OPM has the records to establish his claimed 1953 service and that OPM denied him his complete personnel records. Thus, he contends, the Board should order OPM to produce those records. PFR File, Tab 1, Appellant's PFR at 10. The appellant has not supported his assertion that OPM has such records, an assertion that OPM denies. *See* PFR File, Tab 3, OPM's PFR at 2. Further, if the appellant truly believed that OPM had such records, he could have availed himself of the Board's discovery procedures below in attempting to obtain them, including filing a motion to compel, but he failed to do so. Therefore, he is not entitled to obtain any such records on review. *See Head v. Office of Personnel Management*, 53 M.S.P.R. 421, 422 (1992).

Further, we note that the appellant now claims that he has records to document his claimed 1953 service and has attached to his response to OPM's petition for review a transcript of his course credits from the University of Illinois College of Medicine. PFR File, Tab 5. The transcript contains a column entitled, "Fourth Year Session of 1953-54," followed by a list of medical courses and, at the end of the list, the notation, "Hospital V.A., Long Beach, Calif." *Id.* The document does not provide any specific dates, or number of hours, that the appellant allegedly worked at the Hospital. Also, the document bears a stamp indicating that the appellant obtained it on April 19, 1996, after the issuance of the February 27, 1996 initial decision. The appellant has not explained why he did not timely obtain and submit this document below, stating only that "[t]he University has found [his] records that reflect the service for which he is requesting appropriate credit." PFR File, Tab 5 at 2. Therefore, this document is not entitled to consideration on review because the appellant has not shown that it is new and material evidence that, despite his exercise of due diligence, was unavailable before the record closed below. *See* 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980).

OPM's Cross Petition for Review

The administrative judge erred by finding that the appellant is entitled to make a belated deposit into the civil service retirement fund to cover his post-1956 active military service period.

With respect to whether the appellant is entitled to make a deposit for his post-1956 military service, 5 U.S.C.

§ 8332(j) provides in pertinent part that, except in certain instances not relevant here:

> military service . . . performed by an individual after December 1956 . . . shall be excluded in determining the aggregate period of service on which an annuity payable under this subchapter to the individual . . . is based, if the individual- . . . would on proper application be entitled, at the time of that determination, to monthly old-age or survivors benefits under section 402 of title 42 based on the individual's wages and self-employment income.

5 U.S.C. § 8332(j)(1). Section 8332(j)(2)(A) provides, in relevant part, an exception to such exclusion of military service from computation of a civil service annuity for "any period of military service of an employee or Member with respect to which the employee or Member has made a deposit with interest, if any, under section 8334(j) of this title. . . . "

Nevertheless, 5 U.S.C. § 8332 note, "Recomputation at Age 62 of Credit for Military Service of Current Annuitants," provides:

> Section 307 of Pub. L. 97-253 as amended Pub. L. 97-346, § 3(k), Oct. 15, 1982, 96 Stat. 1649, provided that:
>
> "(a) The provisions of section 8332(j) of title 5, United States Code [subsec. (j) of this section] relating to credit for military service, shall not apply with respect to any individual who is entitled to an annuity under subchapter III of chapter 83 of title 5, United States Code [this subchapter], on or before the date of enactment of this Act [Sept. 8, 1982] *or who is entitled*

> *to an annuity based on a separation from service occurring on or before such date of enactment.*
>
> "(b) Subject to subsection (b), in any case in which an individual described in subsection (a) is also entitled to old-age or survivors' insurance benefits under section 202 of the Social Security Act . . . (or would be entitled to such benefits upon filing application therefor), the amount of the annuity to which such individual is entitled under subchapter III of chapter 83 of title 5, United States Code . . . shall be reduced. . . . "

(Emphasis added.)

The laws that are applicable to the appellant's annuity rights are the laws that were in effect at the time of his separation on November 29, 1981. *See Asprin v. Office of Personnel Management*, 53 M.S.P.R. 320, 323-25 (1992); *see also Avila v. Office of Personnel Management*, 79. F.3d 128, 130 (Fed. Cir. 1996); *Villanueva*, 980 F.2d at 1432-33. Thus, here, because the appellant is entitled to an annuity based on his separation from the service on November 29, 1981, prior to the September 8, 1982 enactment of Pub. L. No. 97-253, he is not entitled to make a deposit for his military service. *See* 5 U.S.C. § 8332 note. Further, inasmuch as the appellant became eligible for old-age or survivors' insurance benefits following his 62nd birthday on January 19, 1992, OPM correctly determined that his annuity is subject to the appropriate reduction under the Social Security Act. *See id.*; AF 1, Tab 6, Subtab 2 at 2 and Subtab 5. Therefore, the administrative judge erred by finding that the appellant is entitled to make a deposit to cover his post-1956 active military service. In view of this finding, OPM's contention that the administrative judge also

erred by stating that the appellant could file a petition for enforcement concerning any dispute as to the amount of back annuity payments resulting from the deposit is moot.[3]

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

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[3] We note OPM's contention that the administrative judge erroneously implied, contrary to *Noveloso v. Office of Personnel Management*, 45 M.S.P.R. 321, 323-24 (1990), *aff'd*, 925 F.2d 1478 (Fed. Cir. 1991) (Table), that the appellant's claimed 1953 service was not creditable because it was temporary service not covered by the Civil Service Retirement Act. *See* PFR File, Tab 3, OPM's PFR at 4. The administrative judge, citing *Noveloso*, correctly stated that "temporary service is creditable service. . . . " but she then stated that the appellant failed to show that his claimed 1953 service "was anything other than a temporary appointment not subject [to] the CSRS." ID at 10-11. Thus, to the extent that the administrative judge may have implied that a temporary appointment is not creditable service under the Civil Service Retirement Act, it was inadvertent error.

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: /s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this OPINION AND ORDER was sent today: By certified mail to:

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November 15, 1996 /s/ Charlene Powers
(Date) Charlene L. Powers
Legal Assistant

Washington, DC

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

ROGER S. SANDERSON, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency. (CSA# 3 337 333)	DOCKET NUMBER SF-0831-95-0692-I-2 DATE: February 27, 1996

Stephen M. Tornay, Esquire, Orange, California, for the appellant.

Connie E. Torrillo, Washington, D.C., for the agency.

BEFORE

Laura M. Albornoz
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant timely re-filed[1] his appeal of the agency's June 9, 1995 reconsideration decision that found

[1] On September 25, 1995, the appellant's appeal, MSPB Docket No. SF-0831-95-0692-I-1, was dismissed without prejudice to refile in order to allow the appellant time to conduct discovery. The documentary evidence submitted in MSPB Docket No. SF-0831-95-0692-I-1 was considered in this decision, and is hereinafter cited as Initial Appeal File 1 (IAF1).

his annuity was correctly computed and he was not eligible for a Civil Service Retirement System (CSRS) discontinued service annuity. The Board has jurisdiction over the appeal under 5 U.S.C. § 8347(d).

For the reasons set forth below, agency's reconsideration decision is AFFIRMED IN PART AND REVERSED IN PART.

ANALYSIS AND FINDINGS

Background

The relevant facts are not in dispute.[2] The appellant was first employed at the Long Beach Veteran's Hospital, Veteran's Administration, Department of Medicine and Surgery (DM&S) when he was a medical student at the University of Illinois. The appellant served a six-month term[3] from January 1, 1953, through June 30, 1953. On July 1, 1954, the appellant returned to the employing agency as a surgeon with special training in Head and Neck Surgery. This appointment ended on June 28, 1955.

The appellant's official record of military service, Form DD-214, shows that he served active-duty in the

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[2] A Board hearing was held in the appeal on February 12, 1996. The agency did not appear having waived the prohibition against ex parte communication. During the prehearing conference, the appellant requested that he be allowed to appear at the hearing by telephone. The request was granted. *See* Initial Appeal File 2 (IAF2), Tab 6. Therefore, this decision is based on the testimony of the appellant, the arguments of counsel and the parties' submissions of record.

[3] *See* IAF1, Tab 1 (Standard Form RI 20-49).

United States Navy from August 15, 1955, through August 14, 1957.

The appellant returned to the Long Beach Veteran's Hospital from July 1, 1959, through June 30, 1963, and from September 3, 1963, as a General Surgeon training Head and Neck surgery to both General Surgical Department residents and Ear, Nose, and Throat (ENT) Department residents, until his separation, on November 29, 1981. The appellant's Individual Retirement Record shows that after March 1, 1965, the appellant only worked as a part-time surgeon with the Veteran's Administration. *See* IAF1, Tab 6, Subtab 6. The record shows that the appellant had a private practice in addition to his part-time employment at the Veteran's Hospital.

The appellant argued that beginning in 1976, his part-time hours were reduced because of the Long Beach Veteran's Hospital association with the new Medical School at University of California Irvine (UCI). He argued that the many of the UCI staff became part-time employees at the Long Beach Veteran's Hospital. The appellant testified that in the summer, 1981, he was advised by Chief of Surgery at UCI that the ENT Department no longer desired the assistance of the General Surgery Department in training Head and Neck surgery and that General Surgical residents would no longer be trained in Head and Neck surgery. Through UCI staff, the appellant heard that the Veteran's Hospital wished to fill his position in General Surgery with a Cardiovascular specialist.

Paul Danville, Administrative Assistant at the Long Beach Veteran's Hospital in 1981, submitted his declaration as to the events surrounding the appellant's separation. Danville stated, under penalty of perjury, that on or about October 8, 1981, he telephoned the appellant for the purpose of seeking his assistance in vacating his position at the Veteran's Hospital. He confirmed that the Veteran's Hospital wished to return the appellant's position back to the General Surgery Department with no training of Head and Neck surgery. Danville averred that he communicated the needs of the Hospital to the appellant and "requested that he voluntarily terminate his position for the good of the Hospital." IAF2, Tab 6. Danville stated that the appellant agreed to resign his position after seeking assurance that the resignation would not adversely affect his retirement rights. Danville declared that he advised the appellant that "it was the intention of the VA Hospital that Dr. Sanderson receive his full pension and that the separation not affect his pension." IAF2, Tab 6. Danville stated that he made the statement based on his knowledge of the appellant's 25 years of valued service. *Id.*

The appellant's resignation was effective November 29, 1981. The appellant did not return to his position at the Hospital. The appellant stated that when his retirement benefits did not arrive, he contacted the Veteran's Hospital Employment Department and was told he must contact the Office of Personnel Management. In 1983, after seeking the assistance of his Congressman, the appellant was advised he would only be entitled to a deferred annuity at age 62, on January 19, 1992. The

appellant did not file an appeal of his resignation alleging coercion at that time.

Ten years later, on October 21, 1991, the appellant wrote to the agency seeking an application form for a deferred annuity. The appellant completed the form. And, he was awarded a monthly CSRS deferred annuity of approximately $800.00. The agency calculated the appellant's annuity based on years of service, reduced for his part-time service, and reduced to eliminate credit for his post-1956 military service.

The appellant argued that he did not realize that his retirement would not be based on his "high-three" average salary until 1992, when he received the deferred annuity. The appellant argued that the Long Beach Veteran's Hospital should have advised him that he would receive only a deferred annuity if he resigned in 1981. Therefore, the appellant argued that his separation was involuntary under 5 U.S.C. § 8336(d), and he was entitled to a discontinued service annuity.[4]

In sum, the appellant argued: 1) He was entitled to a discontinued service annuity under 5 U.S.C. § 8336(d) because his separation was involuntary; 2) he separated before January 1, 1982; therefore, his annuity should not have been calculated using the part-time formula under Public Laws 97-72 and 99-509; 3) his annuity should not

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[4] The appellant's counsel was advised that if the appellant wished to appeal his 1981 resignation as involuntary, such matter should be filed as a separate appeal against the Veteran's Administration. The appellant was also advised that such an appeal may be untimely.

have been reduced to eliminate post-1956 military service; and 4) he is entitled to CSRS credit for his service with the Veteran's Hospital, as a medical student, from January 1, 1953, through June 30, 1953.

Burden of Proof

The appellant bears the burden of proof, by preponderant evidence, to show his entitlement to an annuity. *See Speker v. Office of Personnel Management*, 45 M.S.P.R. 380, 384 (1990), *aff'd*, 928 F.2d 410 (Fed. Cir. 1991).

The appellant has failed to show, by preponderant evidence, that he is now entitled to a discontinued service annuity pursuant to 5 U.S.C. § 8336(d).

First, it is undisputed that, at the time of his resignation on November 29, 1981, the appellant did not meet the age and service requirements for an immediate retirement under 5 U.S.C. §§ 8336(a) or (b). In 1981, the appellant was under 55 years of age and did not have 30 years of service. Therefore, upon separation, the only type of annuity the appellant would be entitled to was a deferred annuity at age 62. The Veteran's Hospital acknowledges that it advised the appellant that his resignation would not affect his retirement rights, and it was on such advice that the appellant chose to resign. In general, resignations are presumed to be voluntary actions. However, when the agency makes a misleading statement upon which the employee *reasonably* relies to his detriment, the resignation will be found to be tantamount to removal. *See Silvestri v. Department of the Army*, 60 M.S.P.R. 594, 598

(1993) (citing *Covington v. Department of Health and Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984)).

Here, I find that the appellant did not appeal his resignation as coerced, when he found, shortly after his separation, that he was not eligible for immediate retirement. Therefore, as noted above, any appeal filed against Veteran's Hospital alleging coerced resignation may be untimely. And, the only issue for determination in this appeal is whether the circumstances surrounding the appellant's 1981 separation statutorily entitle him to a discontinued service annuity under 5 U.S.C. § 8336(d).[5] *See Lematta v. Department of Health and Human Services*, 22 M.S.P.R. 18, 20 n.2 (1984).

The appellant would have the Board find that his resignation was "involuntary" for purposes of 5 U.S.C. § 8336(d). As explained below, I find that the appellant's resignation was not involuntary.

First, under the principles of "involuntariness" cited in *Covington*, I find that a reasonable person in the appellant's circumstance, would not have been misled by Danville's statement. I find that the appellant, a 50-year old physician, with 20 years of Federal service, knew or should have known, that he was not eligible for immediate retirement at the highest annuity rate. Further, there is no evidence that the appellant ever sought clarification of Danville's statement, that the appellant ever completed

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[5] *Compare Lawson v. United States Postal Service*, 68 M.S.P.R. 345, 352 (1995) (where the employee appealed his retirement as coerced because the employing agency incorrectly advised him that he was eligible for a discontinued service annuity).

an application for immediate retirement when he resigned, or that he ever sought an estimate of his annuity benefits.

I find that Danville's statement to the appellant that he would receive a full pension as a valued 25-year employee means the full pension to which the appellant was entitled at the time, i.e., a deferred annuity at age 62. And, the appellant's own subjective and erroneous understanding that if he waited until he reached 62, he would receive an annuity based on service which he did not have, and based on his high-three average salary, was not founded on any information given to him by the Veteran's Hospital or the agency. I find, in this case, that the appellant had a duty, after he realized he would not receive an immediate retirement in response to his Congressman's inquiries in 1983, to seek additional information on the differences between an immediate retirement based on age and years of service, a deferred annuity at age 62 (which would be less), and a discontinued service annuity. Instead the appellant waited ten years, and continued to erroneously believe that at age 62, he would receive an annuity based on his high-three average salary and years of service, in his estimation amounting to $2,000.00 each month.

I find that the appellant's own erroneous interpretation does not now entitle him to anything more than what he was always entitled to based on age and service, a deferred annuity.

Finally, the appellant seeks to remedy his erroneous and unreasonable interpretation of Danville's statement, fifteen years later, not by filing an untimely appeal

against the Veteran's Hospital, but by seeking entitlement to a discontinued service annuity, retroactive to 1981, under 5 U.S.C. § 8336(d) based on "involuntary separation."

Title 5 U.S.C. § 8336(d)(1) specifically provides that an employee who is separated from the service involuntarily, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service, or after becoming 50 years of age and completing 20 years of service, is entitled to an immediate annuity. The undisputed evidence of record shows, and I find that, at the time of his resignation, the appellant met the age and service requirements for a discontinued service annuity.

However, I find that the definition of "involuntary separation" for discontinued service annuity purposes differs from the circumstances that usually define involuntariness for presumed voluntary actions, like resignations and retirements. In the past, the Board has accepted the guidance of the Federal Personnel Manual (FPM) in defining "involuntary separation" for discontinued service annuity purposes. The term has been defined to mean: "[A]ny separation against the will and without the consent of the employee, other than separation for cause on charges of misconduct or delinquency." *Gammill v. Office of Personnel Management*, 29 M.S.P.R. 484, 487 (1985). Examples are: reduction in force; abolishment of position; lack of funds; expiration of incumbent's term of office; liquidation of an office or of an entire agency; inefficiency (unless due to employee's misconduct); transfer of function; disability (initiated by the agency); separation during the probationary period; or separation of a temporary

employee by OPM's instructions. After a careful consideration of the true substance of the above action, I find that the appellant's separation can only be defined as voluntary under title 5 U.S.C. § 8336(d). While, there is no dispute that the appellant was encouraged to resign his position based on the Hospital's need for a Cardiovascular surgeon, the appellant never received notice that he would be involuntarily removed from his position because his job would be abolished. *See Silvestri*, 60 M.S.P.R. at 597, 601 (noting that the FPM required that the appellant receive notice of involuntary separation for discontinued service eligibility).

Not only was the appellant's position still available to him, I find that the long-term changes that occurred after 1976, at the Veteran's Hospital, did not constitute reorganization under 5 U.S.C. § 8336(d)(1) or (2). *See* Appellant's Prehearing Submissions, IAF2, Tab 5. Moreover, I find that title 5 U.S.C. § 8336(d)(2) requires that a significant number of the agency's employees be separated or reduced in pay, for the voluntarily separated employee to be entitled to a discontinued service annuity.

While the appellant may have eventually been given notice of his involuntary separation because of the Hospital's personnel needs, I find that the appellant cut short any entitlement he may have had to a discontinued service annuity by his voluntary resignation.

In sum, I find that Congress intended the statute to apply to circumstances where an employee's tenure is prematurely ended by an agency's action involuntarily separating the employee. As noted above, I find that the appellant had choices, and while his alternatives may

have been unpleasant, his separation was not ended involuntarily, at the hands of the Veteran's Hospital.

Accordingly, I find that the appellant does not meet the statutory requirements of title 5 U.S.C. §§ 8336(d)(1) or (2) for discontinued service annuity benefits.

Pursuant to 38 U.S.C. § 7426(a) and (b), the appellant is not entitled to full credit for his part-time service after March 1, 1965; the appellant has failed to show his service from January 1, 1953, through June 30, 1953, is covered service.

Title 38 U.S.C. § 7426 provides, in pertinent part:

> (a) Except as provided in subsection (b), persons appointed to the Administration shall be subject to the provisions of and entitled to benefits under subchapter III of chapter 83 of title 5 or subchapter II of chapter 84 of title 5, whichever is applicable.
>
> (b)(1) *In computing the annuity under subchapter III of chapter 83, or subchapter II of chapter 84, of title 5 of an individual who retires under such subchapter . . . after December 31, 1981,* who served *at any time* in a less-than-full-time basis in a position in the Administration . . . –
>
> (A) for purposes of determining such individual's average pay . . . the annual rate of basic pay for full-time service shall be deemed to be such individual's basic pay; and
>
> (B) the amount of such individual's annuity . . . shall be multiplied by the fraction equal to the ratio that individual's total full-time equivalent service bears to that individual's creditable service. . . .

> (b)(2) For the purposes of paragraph (1)(B), an individual's full-time equivalent service is the individual's creditable service . . . *except that any period of service of such individual served on a less-than-full-time basis shall be prorated based on the fraction such service bears to full time service.* For the purpose of the preceding sentence, full-time service shall be considered to be 80 hours of service per biweekly pay period.

38 U.S.C. § 7426 (emphasis added).

The undisputed evidence of record shows, and I find, that the appellant's part-time service was with the Veterans Administration. Thus, I find that the appellant was subject to the 38 U.S.C. § 7426. I further find that the agency computed the appellant's annuity at the time he retired, on January 19, 1992, with part-time service under the CSRS; therefore, the agency was required to prorate his part-time service.

I find, under 38 U.S.C. § 7426(b)(2), cited above, the agency properly reduced the appellant's creditable service by a fraction of his part-time service to full-time service. For the reasons set forth above, the appellant has failed to show, by preponderant evidence, his entitlement to an annuity based on full-time service credit after March 1, 1965.

I find that the appellant is only entitled to the rights incident to the positions to which he was appointed. *See Julius v. Department of the Army,* 35 M.S.P.R. 130, 133 (1987), *aff'd,* 852 F.2d 1293 (Fed. Cir. 1988) (Table). As noted above the appellant has failed to show that his service after March 1, 1965, was full-time service, or was performed for other than the Veterans Administration.

Therefore, I have found that such service is not creditable as full-time service under CSRS.

The appellant also argued that he should receive. credit for his service with the Veteran's Hospital as a medical student, from January 1, 1953, through June 30, 1953, a six-month tenure. However, the appellant has failed to show that such service was covered under the CSRS. Service is covered when a Federal employee who is subject to the CSRA, deposits a portion of his pay into the Civil Service Retirement Fund.

Employees who are appointed to non-permanent, indefinite, or temporary positions are not "covered" employees. 5 U.S.C. § 8347(g); 5 C.F.R. § 831.201(a)(1)-(2), (12)-(13). While temporary service is creditable service, because the employee does not contribute to the retirement fund, his employment is not covered service for CSRS annuity purposes. *Noveloso v. Office of Personnel Management*, 45 M.S.P.R. 321, 323-24 (1990), *aff'd*, 925 F.2d 1478 (Fed.Cir. 1991) (Table)). I find that the appellant has failed to submit any evidence to show that his service from January 1, 1953, through June 30, 1953, was anything other than a temporary appointment not subject to the CSRS.

Moreover, I find that as the agency entrusted with the administration of retirement laws and the promulgation of the implementing regulations, OPM is entitled to great deference in its interpretation of the retirement statutes unless the interpretation is plainly erroneous or is inconsistent with the statute, and only where there is compelling evidence that the interpretation is wrong. *See*

Evans v. Office of Personnel Management, 59 M.S.P.R. 94, 104 (1993). There is no such compelling evidence in this case.

The appellant is entitled to make a belated deposit for his post-1956 military service.

Under 5 U.S.C. §§ 8332(j) and 8334(j)(1), a Federal employee *who retired after September 7, 1982,* is entitled to credit for active-duty military service performed after 1956 under both the Civil Service Retirement and Social Security systems, but only if he deposits with the Civil Service Retirement Fund a sum equal to seven percent of his total post-1956 military pay ("Catch 62"). If the annuitant does not make such a deposit, the agency must recompute his annuity payment, excluding credit for post-1956 military service when the annuitant becomes *eligible* for Social Security benefits. *See Nunez v. Office of Personnel Management*, MSPB Docket No. AT-831M-95-0124-I-1, slip op. at 13 (January 23, 1996); *Kondaki v. Office of Personnel Management*, 67 M.S.P.R. 10 (1995); *Pinkston, Jr. v. Office of Personnel Management*, 57 M.S.P.R. 347, 349-50 (1993); *Holtermann v. Office of Personnel Management*, 57 M.S.P.R. 380, 383 (1993); *Fleak v. Office of Personnel Management*, 57 M.S.P.R. 338, 339-40 (1993).

The regulations at 5 C.F.R. § 831.2107 require that the appellant make a deposit before the agency has taken final action on his retirement application. As noted above, the appellant's application for a deferred CSRS annuity was approved when he became 62 years of age, on January 19, 1992. Therefore, I find that the appellant retired after September 7, 1982, but, as noted above, he failed to make a deposit for his post-1956 military service

prior to his separation from the Veteran's Hospital, or prior to the final adjudication of his retirement application.

The Board has held that the agency is required to set a time deadline for the appellant to make a deposit for military service beyond the regulatory deadline in some circumstances. *See Nunez*, MSPB Docket No. AT-831M-95-0124-I-1, slip op. at 13; *Pinkston, Jr.*, 57 M.S.P.R. at 350 n.2 (where the Board found that the Supreme Court's decision in *Office of Personnel Management v. Richmond*, 496 U.S. 414, *rehearing denied*, 497 U.S. 1046 (1990), did not bar the appellant's payment of the deposit after the regulatory deadline because the appellant failed to make the deposit before his separation due to an administrative error; and, he sought benefits for which he was eligible under statutory and regulatory provisions). I find, and the undisputed evidence of record shows, that the appellant was never given the opportunity to make a deposit for his post-1956 military service. Further, there is no evidence to show that the appellant ever signed a written waiver of the deposit.

In accordance with the Board's recent precedent in this area, I find that the appellant was never notified that he could make a seven percent deposit for his post-1956 military service and that such failure on the part of the agency constitutes administrative error. *See Nunez*, MSPB Docket No. AT-831M-950124-I-1, slip op. at 13.

Therefore, I find that the agency shall notify the appellant of the deposit due for his post-1956 military service and set a deadline for the appellant to pay such deposit. Payment of the deposit shall entitle the appellant

to credit for his post-1956 military service in the computation of his deferred annuity.

DECISION

The agency's reconsideration decision is AFFIRMED IN PART REVERSED IN PART.

ORDER

The agency is ORDERED to compute the deposit owed for the appellant's post-1956 military service and set a deadline for the appellant's submission of the payment. If the deposit is timely paid, the appellant's annuity should not be reduced to eliminate his post-1956 military service after age 62. The agency shall compute any back-annuity pay due the appellant, if the deposit is timely made. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

The agency is also ORDERED to issue a check to the appellant for the appropriate amount of back-annuity pay, and to adjust benefits with appropriate credits and deductions no later than 60 calendar days after the date this initial decision becomes final. Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back-annuity pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, the agency is ORDERED to issue a check to appellant for the undisputed amount no later than 60 calendar

days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its efforts to comply.

INTERIM RELIEF

Although appellant is partially prevailing, I have determined not to order interim relief pursuant to Section 6 of the Whistleblower Protection Act of 1989.

FOR THE BOARD: /s/ Laura Albornoz
Laura M. Albornoz
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on *April 2, 1996,* unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

DECLARATION OF STEPHEN M. TORNAY

I, Stephen M. Tornay, hereby declare as follows:

I am an attorney at law, duly licensed to practice before all the Courts of the State of California. During the relevant times hereinafter mentioned I was attorney for appellant Roger S. Sanderson, M.D., in his action against The Office of Personnel Management. If called upon to do so, I could and would competently testify to the following matters from my own personal knowledge:

1. I noted in the decision rendered by Judge Laura M. Albornoz on page four, footnote number four, the following language: "The appellant's counsel was advised that if the appellant wished to appeal his 1981 resignation as involuntary, such matter should be filed as a separate appeal against the Veteran's Administration. The appellant was also advised that such an appeal may be untimely."

2. I do not recall ever having been advised by Judge Albornoz or any other person of such.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Executed this 28th day of March, 1996 at Orange, California.

/s/ Stephen M. Tornay
STEPHEN M. TORNAY, Declarant

REPORT OF CONTACT

NOTE: This form must be filled out in ink or on typewriter, as it becomes a permanent record in veterans' folders.

VA OFFICE	IDENTIFICATION NOS. *(C, XC, SS, XSS, V, K, etc.)*
LBVAMC Surgical Service	
LAST NAME – FIRST NAME – MIDDLE NAME OF VETERAN *(Type or print)* Sanderson, Roger M.D.	DATE OF CONTACT 10-08-81
ADDRESS OF VETERAN	TELEPHONE NO. OF VETERAN 714 549-8243
PERSON CONTACTED Paul Danville, A/A Surgical Service	TYPE OF CONTACT *(Check)* _ PERSONAL X TELEPHONE
ADDRESS OF PERSON CONTACTED	TELEPHONE NO. OF PERSON CONTACTED

BRIEF STATEMENT OF INFORMATION REQUESTED AND GIVEN

Per telephone conversation with Paul Danville, A/A Surgical Service, Dr. Sanderson states he is going to be out of the country and engaged in private enterprise and he wishes to resign his part time position at the VA.

STEPHEN M. TORNAY (SBN: 170132)
625 The City Drive
Fourth Floor
Orange, California 92668

Attorney for Appellant,
ROGER S. SANDERSON

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

ROGER S. SANDERSON, Appellant, vs. OFFICE OF PERSONNEL MANAGEMENT, Agency.	)	DOCKET NUMBER: SF-0831-95-0692-I-2 **NOTICE OF INTENT TO INTRODUCE DECLARATION IN LIEU OF TESTIMONY**

TO ALL PARTIES AND THE HONORABLE COURT:

PLEASE TAKE NOTICE that Appellant, ROGER S. SANDERSON, intends to offer the accompanying declaration of Paul Danville in lieu of live testimony at the hearing scheduled for February 9, 1996.

The current address and phone number of Mr. Danville is:

633 Catalina Drive
Livermore, Calif. 94550
(510) 443-9127

Dated: January 29, 1996

By: /s/ Stephen M. Tornay
STEPHEN M. TORNAY
Attorney for Appellant
ROGER S. SANDERSON, M.D.

DECLARATION OF PAUL DANVILLE

I, Paul Danville, hereby declare as follows:

That I am over the age of 18 and am not a party to the action involving Doctor Roger Sanderson. If called upon to do so, I could and would competently testify to the following matters from my own personal knowledge except for those matters based on information and belief, and as to those matters I believe the information to be truthful:

1. In 1981 when Dr. Sanderson departed the VA Hospital in Long Beach I was employed at the VA in Long Beach as an Administrative Assistant in the Surgery Department. My job duties, responsibilities and authority to act at that time, included, but were not limited to, the handling and coordinating of employee severance.

2. On or about October 8, 1981 I personally called Dr. Sanderson for the purpose of seeking his assistance and cooperation in vacating his position with the Hospital. This was because the hospital desired to return Dr. Sanderson's position to the General Surgical Department from the ENT Department, where Dr. Sanderson had been assigned. The reason for this was based on the fact

that the ENT Department had taken over the primary responsibilities of Head and Neck cases. Dr. Sanderson's slot could better be used by the Hospital in the General Surgery Department. I was instructed by my superiors to make this request of Dr. Sanderson.

3. During the October 8, 1981 conversation I communicated the desires and needs of the VA Hospital to Dr. Sanderson and requested he voluntarily terminate his position for the good of the Hospital. Dr. Sanderson agreed to my request after seeking assurance that such termination would not adversely affect his pension. I specifically, and on behalf of the VA Hospital, advised and assured Dr. Sanderson that it was the intention of the VA Hospital that Dr. Sanderson receive his full pension and that the separation not affect his pension. This was based on my knowledge that Dr. Sanderson had been a valued member of the VA staff for 25 years.

4. Had I known that my request that Dr. Sanderson voluntarily terminate his position would adversely affect his pension, I would never have made the request of him that he voluntarily terminate his position.

5. The form that details Dr. Sanderson's separation, and bears my signature (VA form 119 – contained in Dr. Sanderson's file), stating that Dr. Sanderson "wishes to resign his position" while technically accurate, is nonetheless misleading. As noted above, Dr. Sanderson's "wish" to resign was predicated upon his desire to promote the best interests of the VA Hospital and was based on the needs and assurances I made to Dr. Sanderson. Had I not come to Dr. Sanderson and asked for his aid in

vacating his position I know Dr. Sanderson would not have self-terminated his position.

6. It is my professional opinion that, in essence, Dr. Sanderson's termination was involuntary and due primarily (if not exclusively) to the needs of the Hospital and was part of a reorganization plan wherein UCI Medical School took over for UCLA and its subsidiary schools.

7. It should be noted that in 1976 Dr. Sanderson's position was cut to three (3) hours per pay period when Dr. Turnbull (a Head & Neck Surgeon from the University of Irvine) was appointed to the ENT Staff. Dr. Turnbull later became Chief of the ENT Department. The Chief of Surgery, Dr. Stemmer, came to the VA Hospital in 1965 specifically to change the VA Hospital's affiliation from UCLA and two other medical schools to the new UCI Medical School.

I declare under penalty of perjury of the laws of the State of California and of the United States of America that the foregoing is true and correct.

Executed this 28 day of December, 1995 at Livermore, California.

/s/ Paul Danville
PAUL DANVILLE, Declarant

SUPPLEMENTAL DECLARATION OF PAUL DANVILLE

I PAUL DANVILLE DECLARE

1. I PAUL DANVILLE, HEREBY DECLARE THAT THIS IS AN AMENDMENT TO MY DECLARATION OF DECEMBER 28, 1995, SIGNED AT LIVERMORE, CALIFORNIA.

2. I SPECIFICALLY, AND ON BEHALF OF THE VA HOSPITAL, ADVISED DR. SANDERSON THAT IT WAS THE INTENTION FOR THE VA HOSPITAL THAT DR. SANDERSON RECEIVE HIS FULL PENSION AND THAT HIS SEPARATION NOT AFFECT HIS PENSION. BY HIS PENSION, I MEANT HIS PENSION BASED UPON HIS "HIGH THREE" YEARS SALARY.

3. I DID NOT EXPLAIN TO HIM PUBLIC LAW 97-72 AS WE DID NOT BELIEVE THIS LAW APPLIED TO DR. SANDERSON WHO WAS SEPARATED PRIOR TO THE EFFECTIVE DATE OF THIS LAW.

I DECLARE UNDER PENALTY OF PERJURY THE FORGOING IS TRUE AND CORRECT AND IF CALLED UPON TO TESTIFY TO SAME I COULD DO SO COMPETENTLY.

June 17, 1997
DATE

/s/ Paul Danville
PAUL DANVILLE

OPM Brief in the United States Court of Appeals for the Federal Circuit

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Asprin v. Office of Personnel Management,
53 M.S.P.R. 320 (1992) 32

Avansino v. U.S. Postal Service,
3 M.S.P.R. 211 (1980) 30

Avila v. Office of Personnel Management,
79 F.3d 128 (Fed. Cir. 1996) 32

Baker v. United States,
614 F.2d 263 (Ct. Cl. 1980) 27

Balick v. Office of Personnel Management,
85 F.3d 568 (Fed. Cir. 1996) 12

Bradbie v. Equal Employment Opportunity Commission,
705 F.2d 1331 (Fed. Cir. 1983) 12

Brewer v. United States Postal Service,
647 F.2d 1093 (Ct. Cl. 1981), *cert. denied*,
454 U.S. 1144 (1982) 11

Bronger v. Office of Personnel Management,
769 F.2d 756 (Fed. Cir. 1985), *cert. denied*,
474 U.S. 1101 (1986) 25

Brotherhood of Railroad Trainmen v. Central of Georgia Railway, 415 F.2d 403 (5th Cir. 1969), *cert. denied*,
396 U.S. 1003 (1970) 21

Carroll v. Department of Health & Human Services,
703 F.2d 1388 (Fed. Cir. 1983) 11

Cheeseman v. Office of Personnel Management,
791 F.2d 138 (Fed. Cir. 1986), *cert. denied*,
479 U.S. 1037 (1987) 10

Consumer Products Safety Commission v. GTE Sylvania,
447 U.S. 102 (1980) 24

Costner v. United States,
665 F.2d 1016 (Ct. Cl. 1981) 27, 28

Covington v. Dep't of Health and Human Services,
750 F.2d 937 (Fed. Cir. 1984) 14, 16, 20

Curran v. Office of Personnel Management
566 F. Supp. 1511 (D D.C. 1983) 27

Darsigny v. Office of Personnel Management,
787 F.2d 1555 (Fed. Cir. 1987) 25

DeSarno v. Department of Commerce,
761 F.2d 657 (Fed. Cir. 1985) 12

Ford Motor Credit Co. v. Cenance,
452 U.S. 155 (1981) 24

Gammill v. Office of Personnel Management,
29 M.S.P.R. 484 (1985) ..... passim

Gunn v. Veterans Administration Medical Center,
892 F.2d 1036 (Fed. Cir. 1990) 10

Hambsch v. Department of the Treasury,
796 F.2d 430 (Fed. Cir. 1986) 12

Hampton v. Paramount Pictures,
279 F.2d 106 (9th Cir. 1959), *cert. denied,*
367 U.S. 882 (1960) 21

Hayes v. Department of the Navy,
727 F.2d 1535 (Fed. Cir. 1984) 10

Horner v. Acosta,
803 F.2d 687 (Fed. Cir. 1986) 27

Horner v. Benedetto,
847 F.2d 814 (Fed. Cir. 1988) 25

Kozer v. Office of Personnel Management,
52 M.S.P.R. 93 (1991) 29

Lematta v. Department of Health and Human Services,
22 M.S.P.R. 18 (1984) 14, 16

Manion v. Merit Systems Protection Board,
737 F.2d 102 (Fed. Cir. 1984).....19

Matter of Pubs, Inc. of Champaign,
618 F.2d 432 (7th Cir. 1980).....21

Mays v. Dep't of Transportation,
27 F.3d 1577 (Fed. Cir. 1994).....13

McCarley v. Merit Systems Protection Board,
757 F.2d 278 (Fed. Cir. 1985).....27

Mississippi Valley Barge Line Co. v. United States,
292 U.S. 282 (1934).....11

National Treasury Employees Union v. Reagan,
663 F.2d 239 (D.C. Cir. 1981).....27, 28

Oden v. Office of Personnel Management,
58 M.S.P.R. 249 (1993).....19

Office of Personnel Management v. Richmond,
496 U.S. 414, *reh'g denied,*
497 U.S. 1046 (1990).....passim

Parker v. United States Postal Service,
819 F.2d 1112 (Fed. Cir. 1987).....11

Phillips v. United States Postal Service,
695 F.2d 1389 (Fed. Cir. 1982).....10

Power v. United States,
531 F.2d 505 (Ct. Cl. 1976).....11

Rockwell v. Department of Transp.,
789 F.2d 908 (Fed. Cir. 1986).....11

Roger S. Sanderson v. Office of Personnel Management,
72 M.S.P.R. 311 (November 15, 1996).....2

Sanders v. United States Postal Service,
801 F.2d 1328 (Fed. Cir. 1986).....12

Scharf v. Department of the Air Force,
710 F.2d 1572 (Fed. Cir. 1983).....20

Schellfeffer v. United States,
343 F.2d 936 (Ct. Cl. 1965).....25

Stanek v. Department of Transportation,
805 F.2d 1572 (Fed. Cir. 1986).....11

Taylor v. United States,
591 F.2d 688 (Ct. Cl. 1979).....20

Tiffany v. Department of the Navy,
795 F.2d 67 (Fed. Cir. 1986).....19

True v. Office of Personnel Management,
926 F.2d 1151 (Fed. Cir. 1991).....10

Vagg v. Office of Personnel Management,
1 F.3d 1208 (Fed. Cir. 1993).....13

Villanueva v. Office of Personnel Management,
980 F.2d 1431 (Fed. Cir. 1992).....28, 32

Wassenaar v. Office of Personnel Management,
21 F.3d 1090 (Fed. Cir. 1994).....13

Watts v. Office of Personnel Management,
814 F.2d 1576 (Fed. Cir. 1987),
cert. denied, 484 U.S. 913 (1987).....27, 28

STATUTES AND REGULATIONS

United States Code — Page(s)

5 U.S.C. § 2105(a).....passim

5 U.S.C. § 7703(c).....10

5 U.S.C. § 8332(j)(1).....30

5 U.S.C. § 8332(j).....31, 32

5 U.S.C. § 8334(j).....31, 32

5 U.S.C. § 8336(d)(1).....passim

5 U.S.C. § 8338(a).....13, 22, 23

38 U.S.C. § 7426.....passim

Code of Federal Regulations

5 C.F.R. § 1201.115 30
5 C.F.R. § 752.401(c)(3) 16

* * *

EXCERPTS FROM OPM BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Assuming that Dr. Sanderson's decision to resign constituted an "involuntary" separation in the sense that it was obtained by misinformation, Dr. Sanderson would still not be entitled to a discontinued service retirement because the term "involuntary," as used in 5 U.S.C. § 8336(d)(1), refers only to a *valid* separation on involuntary grounds, as is the case when there is a reduction in force, abolishment of position, lack of funds, liquidation of an office or entire agency, geographical transfer, or an expiration of a time-limited appointment.

[p. 9]

* * *

B. Even Assuming That Dr. Sanderson Was Involuntarily Separated, He Is Still Not Entitled To A Discontinued Service Retirement Under 5 USC § 8336(d)(1)

Even assuming that Dr. Sanderson's separation was somehow "involuntary in the sense that it was obtained as a result of misinformation, he still would not be entitled to a discontinued service retirement under 5 U.S.C. § 8336(d)(1). This is because a determination that a separation is obtained by misinformation, and therefore

"involuntary" for Board jurisdictional purposes,[3] is "totally separate and distinct from" OPM's determination of involuntary separation for retirement purposes under 5 U.S.C. § 8336(d). *Lematta v. Dep't of Health and Human Services*, 22 M.S.P.R. 18, 21 n.2 (1984). *See Covington v. Dep't of Health and Human Services*, 750 F.2d 937, 940 (Fed. Cir. 1984); *Gammill v. Office of Personnel Management*, 29 M.S.P.R. 484, 488-89 (1985).

The term "involuntary," as used in 5 U.S.C. § 8336(d)(1), refers only to a *valid* separation on involuntary grounds, against the employee's wish, not involving charges of misconduct or delinquency. In determining whether a separation is involuntary for purposes of a discontinued service retirement, the MSPB looks to FPM Supp. 831-1, subch. 511-2(a) (Sept. 21, 1981), which was in effect at the time of Dr. Sanderson's separation on November 29, 1981, and provides as follows:

[p. 16]

> a. Definition of term. The term *involuntary separation* means any separation against the will and without the consent of the employee, other than separation for cause on charges of misconduct of delinquency. Examples are: reduction in force; abolishment of position; lack of funds; expiration of incumbent's term of office; liquidation of an office or of an entire agency; inefficiency (unless due to the employee's

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[3] Voluntary action initiated by an employee precludes a subsequent appeal to the MSPB. 5 C.F.R. § 752.401(c)(3) (1984). Thus, in order for the MSPB to have jurisdiction over a retirement claim, a petitioner must demonstrate that his retirement was involuntary.

> misconduct); transfer of function outside the commuting area; disability (provided the separation action is initiated by the agency); separation during probation because of failure to qualify; or separation of an indefinite or temporary employee under OPM's instructions for displacement. . . . Note, however, that whether a separation is involuntary depends upon all the facts in a particular case; it is the true substance of the action which governs rather than the methods followed or the terminology used. . . .

Gammill v. Office of Personnel Management, 29 M.S.P.R. at 487-88.

Here, Dr. Sanderson has failed to allege any of the above circumstances set forth in the FPM. Dr. Sanderson was not forced to resign against his will and without his consent, as is the case when there is a reduction in force, abolishment of position, lack of funds, liquidation of an officer or entire agency, geographical transfer, expiration of a time-limited appointment, or when any of the other circumstances contemplated by 5 U.S.C. § 8336(d)(1) arises. Indeed, while each of the example of involuntary separation contemplated by 5 U.S.C. § 8336(1) involve circumstances where there is a *valid* involuntary retirement, Dr. Sanderson alleges here that his separation was an *invalid* adverse action obtained by misinformation and without proper procedure.

[p. 17]

Essentially, Dr. Sanderson has confused an *invalid* involuntary separation, obtained without proper adverse action procedures, with a *valid* involuntary separation. While the former requires a determination of whether the

separation from service was obtained by coercion, deception or misinformation for Board jurisdictional purposes, the latter simply requires a determination of whether the separation from service was involuntary for retirement purposes, as contemplated by 5 U.S.C. § 8336(d)(1).[4] Significantly, the two definitions and usages of the term "involuntary" separation or retirement are not identical or interchangeable. *Gammill v. Office of Personnel Management*, 29 M.S.P.R. at 488-89 ("a finding of involuntariness due to misrepresentation is not sufficient to establish entitlement to a discontinued service annuity").

Dr. Sanderson's theory of relief before the MSPB, and, in part, before this Court, is that he was deprived of free choice when making his decision to voluntarily resign. He then contends, at least implicitly, that instead of a deferred annuity commencing on January 19, 1992, he is entitled to a discontinued service retirement based upon an involuntary separation under 5 U.S.C. § 8336(d)(1). Pet. Br. 12-15. In effect, therefore, Dr. Sanderson argues that a perceived *invalid* adverse action against him by the VA constitutes a basis for requiring OPM to award him a discontinued service retirement under 5 U.S.C. § 8336(d)(1).

[p. 18]

However, to the extent that Dr. Sanderson may have a proper remedy at this time for his allegedly *invalid*

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[4] In part, the confusion that has arisen may be traceable to the fact that both invalid separations without adverse action procedures, and retirements based upon valid involuntary separations have been referred to as "involuntary separations" in common usage.

involuntary separation, his cause of action would lie against the VA, not OPM. It is well-settled that the only proper party respondent in an appeal by an individual challenging a particular agency action is the agency which took the action, not another agency. *Tiffany v. Department of the Navy*, 795 F.2d 67, 69 (Fed. Cir. 1986); *see also Manion v. Merit Systems Protection Board*, 737 F.2d 102 (Fed. Cir. 1984); *Oden v. Office of Personnel Management*, 58 M.S.P.R. 249 (1993).

[p. 19]

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